

**POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

**MILTON BOHART and
MARGARET COCHRAN.**

Appellants,

v.

**STATE OF WASHINGTON.
DEPARTMENT OF ECOLOGY;
CHARLES and MARILLOUIS
SHERWOOD together with
KRIS and DONNA TYSON;**

Respondents.

PCHB NOS. 94-49 & 50

ORDER OF DISMISSAL

I

The appellants, Milton Bohart and Margaret Cochran, timely appealed to the Pollution Control Hearings Board ("Board"), a denial by the Department of Ecology ("Ecology") of an application to appropriate public ground water. The applicants for the permit were respondents, Charles and Marilouis Sherwood, together with Kris and Donna Tyson.

II

Ecology, on August 25, 1994, filed a motion to dismiss the appeal, on the ground that the appeal failed to state a claim upon which relief could be granted.

III

Margaret Cochran filed a responsive letter on September 6, 1994.

**ORDER OF DISMISSAL
PCHB NOS. 94-49 & 50**

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IV

The Board, having considered the above documents, and the contents of the appeal, Ecology's Memorandum of Law in Support of the Motion to Dismiss, and the Affidavit of Phillip Crane, rules as follows

V

Ecology denied the respondents' application to withdraw up to 45 gallons per minute for the irrigation of 4-5 acres. Both Mr. Bohart and Ms. Cochran protested the application. Mr. Bohart is a neighbor in the Wenatchee Heights area. He had previously applied for and was denied water rights from a spring and a shallow well that Ecology determined was in hydraulic continuity with the surface waters of Cummins Creek.

VI

Ms. Cochran, and Joseph Hedges are claimants No. 1 in the Cummins Creek Adjudication.

V

Ecology found, in its Report of Examination, that the subject well has already been drilled. It lies near the watershed divide between Cummins Canyon and Squilchuck Creek. Both Cummins and Squilchuck Creeks have historically had water shortages. Both have been adjudicated to determine the priority of water rights.

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VI

Ecology concluded that the proposed use would interfere with existing rights, and that the granting of a permit would be contrary to the public interest

VII

The appellants complain that Ecology is not protecting senior water right holders, by allowing domestic use of the Shrewood well. The Sherwoods are currently using the well for domestic use. However, domestic use was not included as a proposed use in the application. RCW 90.44.050 allows public ground water to be withdrawn for domestic use without a permit, provided that the withdrawal does not exceed 5,000 gallons per day. Ecology warned the well users that such withdrawal would be subject to regulation during periods of water scarcity.

VIII

The Board has no jurisdiction to review an action of Ecology, unless it is authorized to do so under RCW 43.21B.110. Essentially, the Board's jurisdiction over water rights is limited to permit decisions, civil penalties and regulatory orders. RCW 43.21B.110(1)(a)-(c).

IX

The Board may hear and decide motions to dismiss, under the Civil Rules for Superior Court ("CR"). WAC 371-08-146, CR 12(b)(6), authorizes the defense of "failure to state a claim upon which relief can be granted" to be made by motion.

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X

We conclude that the Board has no jurisdiction over this appeal. Ecology denied the application which is being appealed. The respondents are not required to have a permit for the withdrawal of ground water for domestic purposes, under 5,000 gallons per day. There is no evidence that the respondents are exceeding that exemption. Even if there were, Ecology has not initiated an enforcement action, therefore, there is no regulatory order nor civil penalty to review. Thus, the appellants have stated a claim for which there is no present relief.

XI

Based on the foregoing analysis, the Board enters the following

ORDER

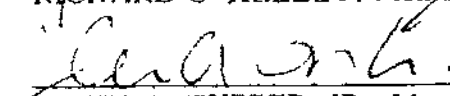
Ecology's Motion to Dismiss is granted.

DONE this 23rd day of September, 1994

POLLUTION CONTROL HEARINGS BOARD


ROBERT V. JENSEN, Presiding Officer


RICHARD C. KELLEY, Member


JAMES A. TUPPER, JR., Member

P94-49D